

Verdida (Migration) [2018] AATA 5297 (16 November 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Noeme Verdida
CASE NUMBER:	1728112
DIBP REFERENCE(S):	BCC2015/3603657
MEMBER:	Simone Burford
DATE:	16 November 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; • r.2.03A of the Regulations.

Statement made on 16 November 2018 at 11:33am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – genuine and continuing partner relationship – limited joint financial commitments – applicant pregnant with the sponsor’s child – six years co-habitation – sharing responsibility for the housework – joint social activities – parties intend to marry – plans to purchase a home together – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359AA
Migration Regulations 1994, Schedule 2, cls 820.211. 820.221; rr 1.09A, 2.03

CASES

Bretag v Immigration Review Tribunal and Minister of Immigration, Local Government and Ethnic Affairs [1991] FCA 582

He v MIBP [2017] FCAFC 206

Minister for Immigration and Ethnic Affairs v Pochi [1980] FCA 85; (1980) 4 ALD 139

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 6 November 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Miss Noeme Verdida, applied for the visa on 1 December 2015 on the basis of her relationship with her sponsor, Mr Lawrence Bilick. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant met the definition of spouse or de facto partner under s.5F or s.5CB of the Act.
4. The applicant appeared before the Tribunal on 12 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Lawrence Bilick, Mr Mostyn McAullay, a friend of the parties, and Mr Chris Bilick, the sponsor's brother.
5. The applicant was represented in relation to the review by her registered migration agent. The migration agent attended the hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the de facto partner of her sponsor.

Whether the parties are in a spouse or de facto relationship

8. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

9. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
10. In forming an opinion whether the parties are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) of the Regulations, which is attached to this decision.

Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

11. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision which was submitted by the applicant with the application for review, and other material available to it including material submitted by the applicant prior to and following the Tribunal hearing.
12. The Tribunal notes that there was very limited evidence before the Department in support of the relationship. The parties provided additional information to the Tribunal including a number of third-party statutory declarations from friends and family of the parties supporting the relationship and their account of its history and attesting to the ongoing nature of the relationship.
13. The applicant and the sponsor both gave evidence at the hearing. The Tribunal questioned them at length about their relationship. The Tribunal took evidence regarding the development of their relationship, their relationship history, knowledge of each other's background and family history, financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were consistent.
14. The Tribunal found the applicant and sponsor to be credible witnesses and accepts their oral evidence on this basis. The Tribunal has considered their oral evidence together with the additional documentary evidence submitted at the review stage in reaching its findings.

15. *Relationship background*

16. The applicant is a 39-year-old Filipino national. She has one prior marriage in 1994. Her husband died in 2001. She has three children from this relationship. The sponsor is a 71-year-old Australian citizen. He was previously married in 1968 and divorced in 1994. He has three children from that marriage.
17. The parties claimed in their application to have met in the Philippines in September 2012 through mutual friends. As outlined below, they submitted, following the hearing, that they actually met in September 2011. They spent several weeks together in Manila before the sponsor returned to Australia. They maintained contact by phone and emails until the sponsor returned to Manila in September 2014. The applicant then came to Australia on a visitor's visa in October 2014 to live with the sponsor. They filed the application for a partner visa on 1 December 2015.

18. *Adverse material*

19. At the hearing the applicant and sponsor provided inconsistent answers to several questions. The Tribunal is mindful of its obligations under s.359AA of the Act to put this information to the applicant for her comment or response during the hearing.
20. The Tribunal put to the applicant that she had told the Tribunal during questioning that the sponsor had six grandchildren. However, during his testimony the sponsor indicated that he had five grandchildren. During questioning about their activities the applicant told the Tribunal that on the previous Saturday night the applicant had indicated that she and the sponsor had gone to a restaurant in Fremantle. However, the sponsor told the Tribunal that they were at home watching the football with friends.
21. The Tribunal offered the applicant the opportunity to request a short adjournment to consider her responses to the information. The Tribunal also offered the applicant the opportunity to provide written submissions or additional information in relation to those matters or any other

matter relating to her application within 14 days of the hearing. A short adjournment was held.

22. When the hearing recommenced the applicant indicated that in relation to the question regarding the sponsor's grandchildren she had been confused and had included his one great grandchild in her response as to the number of grandchildren. The sponsor confirmed that he had one great grandchild in addition to his five grandchildren.
23. In relation to the responses about their social engagements on the Saturday night prior to the hearing, the applicant indicated that she had been incorrect and the visit to Fremantle had been the weekend before. She indicated that she was less focused on the football than the sponsor and had gotten the dates confused as a result.
24. The Tribunal also offered the applicant the opportunity to provide written submissions or additional information in relation to those matters or any other matter relating to her application within 14 days of the hearing. No further submissions were received from the applicant within the designated timeframe in relation to that information. However, submissions were received from the applicant's representative on 10 October 2018 (following a further invitation which is detailed below). Those submissions restated the responses of the applicant provided during the hearing and have been taken into account by the Tribunal.
25. Following the hearing, on 17 September 2018 the Tribunal invited the review applicant to comment on, or respond to, additional information which the Tribunal considered would, subject to her comment or response, be the reason or part of the reason for affirming the decision under review. The particulars of the information were as follows:
 - On the 'Application for migration to Australia by a partner' the applicant indicated that the applicant and sponsor first met on 1 September 2012.
 - At the hearing held on 13 September 2018, the applicant and the sponsor both testified that they first met in the Philippines in September 2012.
 - Department movement records for the sponsor, Lawrence Gerard Bilick, indicate that he was onshore in Australia between 26 September 2011 and 16 May 2014.
26. On 1 October 2018 the Tribunal received a response to this invitation from the applicant's registered migration agent. The response included a statutory declaration provided by the applicant and a statutory declaration provided by the sponsor. In her statutory declaration, the applicant indicated that she and the sponsor had both been under the impression that their meeting had been in September 2012. She submitted:

At the hearing I mistakenly advise the Tribunal that MMI partner Mr Laurie Bilick whilst he was on a trip the Philippines in September 2012.

I advise the Tribunal of our first meeting during that month and year as I honestly believed it to be true.

I now know I was mistaken in my recollection of that meeting as he was not in the Philippines in 2012.

The Tribunal has pointed out he was in Australia then – according to his Department of immigration movement records.

A partner also believed that the date we provided to the Tribunal and in our application was true in respect of my partner visa to the best of our ability.

It is now apparent that a recollection of that exact date was hazy.

I'm very sorry for this mistake and I can state that I did not intend to mislead the Tribunal in any way in relation to this detail.

I now know from my examination of Mr Bilick's movement records that it was one year before that date.

Our first meeting occurred in September 2011, and not September 2012.

27. The sponsor's statutory declaration is in similar terms.
28. The Tribunal has considered the applicant's responses to the material put to her at the hearing and following the hearing in the context of all the material before it in reaching a decision.
29. In forming an opinion whether the parties are in a de facto relationship the Tribunal has given consideration to all of the circumstances of the relationship.

30. *Financial aspects*

31. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the other party and any sharing of the day-to-day household expenses.
32. The parties provided financial information which reflects their financial circumstances.
33. The parties testified that they maintained separate bank accounts and a joint bank account. In addition they have a car loan in the applicant's name for which the sponsor is a signatory.
34. The sponsor is a retired cabinetmaker and receives a government pension. He has declared his relationship with the applicant and his pension has been reduced accordingly. The applicant has been working for around two years as an assistant in a nursing home.
35. Prior to this the applicant was on a visitor's visa and did not work. During this time she was supported by the sponsor who was at that stage still working as a self-employed cabinetmaker.
36. The applicant indicated that around half her income is being used to support her three sons in the Philippines who live with her father and are cared for by her sister. Her sons are in high school and university. The sponsor was aware that the applicant was financially supporting her sons.
37. The parties originally lived in Spearwood, in accommodation linked to a construction project the sponsor was working on, and then from 2015 in a home owned by the sponsor in White Gum Valley. This home was sold in 2016 and they continued to rent the property until October 2017. They then moved into a rental property in Coogee. The lease is in the sponsor's name and until recently they shared the home with one lodger who they found through Airbnb.

38. The sponsor indicated that he lost a lot of money on a single project a number of years ago. The applicant is aware of this and has supported him, including in a plan to rebuild their financial security.
39. The applicant has a car loan which is in her name but for which the sponsor is also signatory. The parties indicated that they both contribute to paying for this loan from the joint account. The rent is paid out of the joint account and utilities are in the sponsor's name but are paid from either account depending on funds.
40. The Tribunal was satisfied on the applicant's evidence that the parties have combined their finances and day-to-day living expenses in a manner which is consistent with a de facto relationship.
41. Based on the evidence provided, the Tribunal finds that the parties' financial arrangements are such that would indicate they are in a genuine de facto relationship and have been so since October 2014.

42. *Nature of the household*

43. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
44. The parties do not have any children together and do not have any responsibility for the care of children. The sponsor's children are adults and have children of their own. The applicant's children are adults or in their late teens. While the applicant financially supports her children, they are cared for by her sister and live with her father.
45. The parties testified they have lived together since the applicant came on a visitor's visa in October 2014. They initially lived together in Spearwood and then from 2015 at a home owned by the sponsor in White Gum Valley. This property was sold in 2016 to a friend and the parties leased it for a further year in both names. A copy of the tenancy agreement was provided to the Tribunal.
46. The parties moved to a rental property in Coogee in 2017. This property is leased in the name of the sponsor.
47. The parties provided correspondence addressed to the parties individually and jointly in the form of bank statements, utility bills, phone bills and medical records. They also provided copies of passenger movement cards, obtained under FOI. The first of these, which is undated, provides the White Gum Valley address for Miss Verdida but lists her friend Mrs McAullay as an emergency contact. The second, from February 2015, provides an address in Perth but an email address of the sponsor as a contact. The third, which appears to incorrectly list the applicant's birth date as the date of the incoming passenger card, lists the White Gum Valley address and the sponsor as the emergency contact. The fourth, which again lists the applicant's birth date as the date of the incoming passenger card, lists the Coogee address for the applicant. The fifth, dated 24 May 2018, lists the Coogee address and the sponsor's email address but lists Mrs McAullay as the emergency contact.
48. Although the evidence of the parties' living arrangements is somewhat patchy it was supported by the two third-party witnesses who testified at the hearing, and having regard to all the evidence, the Tribunal is satisfied that the parties were sharing a home as a de facto couple when the applicant was in Australia. All parties gave consistent evidence that most of the house work is done by the applicant, with external maintenance being done by the sponsor. The applicant does most of the cooking, principally Filipino food.

49. The Tribunal is satisfied on the sworn evidence that the nature of the parties' household is such that would indicate a genuine de facto relationship and has been so since the applicant arrived in Australia to live with the sponsor in October 2014.

50. *Social aspects of the relationship*

51. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a de facto relationship, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.
52. The parties have provided supporting material including photographs together and in group settings and with friends and family. There is third party support for the relationship in form 888 statements from Mr Mostyn McAullay, Mr Derek Cooke, Mr Daniel Gore and an unsigned statement from a Mr Patrick Lyons. The parties also provided a list of names of families and friends who they indicated were prepared to support the visa application.
53. Third party statements supporting the relationship were from a variety of sources and provided evidence supportive of the couple's account of the relationship. The Tribunal places weight on these statements.
54. The parties provided a copy of the sponsor's account profile on the Department of Health website 'My Aged Care'. This indicates under relationship status that the applicant is the sponsor's de facto partner. It also indicates that the applicant is permitted to discuss the sponsor's payments and vice versa. The report indicates that this information was submitted on 8 December 2017 although it is unclear from the statement when individual pieces of information were included in the report.
55. The evidence portrays a couple who are committed to each other and recognised as being in a de facto relationship by their friends, families and acquaintances. This is consistent with the way the couple presented at the hearing. The Tribunal finds, based on the supporting evidence, that the parties represent themselves socially to be in a de facto relationship and are recognised as such by family and friends.

56. *Nature of the parties' commitment and any circumstances of the relationship*

57. The Tribunal has had regard to evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
58. The parties claim to have met in 2011 and have been in a relationship since 2014, when the applicant came to Australia, initially on a visitor's visa. In a statement dated 13 December 2017, the sponsor indicated that the parties intend to marry if the application is successful. They confirmed this in testimony before the Tribunal.
59. The parties indicate that they are hopeful of purchasing a home together in the future.
60. The sponsor has a [medical condition] which requires him to take tablets as part of [specified] treatment. He indicated that the [condition] is manageable in this way and that he doesn't have significant health effects as a result. The applicant has been treated for [a disease] while in Australia, including hospitalisation for the disease. She has now completed treatment and indicates that she is fully recovered.

61. The Tribunal notes there is a significant age difference between the couple. However, they presented as a committed couple who appear to enjoy each other's company and socialise together frequently. Their account of their relationship and their commitment was supported by third party evidence. They demonstrated they provide companionship and emotional support to one another and view the relationship as long-term.

62. Assessment of adverse information

63. A number of inconsistencies were put to the applicant during and following the hearing.
64. The Tribunal accepted the parties' evidence with respect to the reasons for these inconsistencies.
65. The Tribunal had concerns regarding the evidence with respect to the date the parties met being incorrect. This was not an insignificant discrepancy but the Tribunal formed the view that it arose from an early error in the application and as the actual date of meeting was earlier than that provided it could arguably strengthen rather than undermine the parties' claim to a long standing relationship.
66. Despite the concerns, outlined above, and having regard to the time the parties have spent together since their meeting, the Tribunal is satisfied that this was an inadvertent error and is not a reason to affirm the decision under review.

67. Conclusion

68. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together or not separately and apart on a permanent basis and have done so since October 2014.
69. The Tribunal is also satisfied the parties are not related by family.
70. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.
71. Therefore, the applicant meets cl.820.211(2)(a). The Tribunal accepts that the applicant was sponsored and therefore meets cl.820.211(2)(c), and as she was the holder of a substantive visa at time of her application, cl.820.211(2)(d) does not apply. The applicant continues to meet these requirements at the time of decision. She therefore meets cl.820.221(1).
72. Therefore the applicant meets cl.820.211(2) and cl.820.221.

Are the additional criteria for a de facto relationship met?

73. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
74. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the

grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

75. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
76. As noted above, the Tribunal is satisfied, on the evidence that the parties have been in a de facto relationship since October 2014 when the applicant travelled to Australia to live with the sponsor. While there were periods they were not living together during that first year when the applicant returned home to the Philippines to renew her visa the Tribunal is satisfied they were not living separately and apart on a permanent basis.
77. The Tribunal has found that the parties have been living together or not separately and apart on a permanent basis; they have had a mutual commitment to a shared life to the exclusion of all others and have been in a genuine and continuing relationship since this time.
78. While there is not strong documentary evidence in relation to the period prior to the application being made, the Tribunal also notes that it is satisfied that the parties are in a de facto relationship at the time of the decision, which is almost three years since the application was made. The Tribunal has had regard to the evidence supporting the relationship across its course and is satisfied with the parties' account of the relationship, including the commitment to live together as a de facto couple since the applicant came to Australia in October 2014.¹ This was supported by third party evidence.
79. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
80. For these reasons the Tribunal **is** satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

DECISION

81. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
82. In reaching its conclusions, the Tribunal observes there is a two-stage process before a permanent visa is granted in the partner migration stream and therefore there will be a further assessment of the relationship at the permanent visa stage and the matter of the genuineness of the relationship and commitment of the parties will be considered again, on the facts that exist at that time. These observations are made given there are reservations about some of the inconsistencies in the parties account of their relationship.
83. For present purposes, having regard to the totality of the evidence before it, the Tribunal is satisfied that at the time of the application and the time of the decision the visa applicant and review applicant have a mutual commitment to a shared life to the exclusion of all others and the relationship is genuine and continuing. The Tribunal is also satisfied that the parties are living together or not separately and apart on a permanent basis.

¹The evidence of the subsequent history is only relevant so long as it "tends logically to show the existence or non-existence of facts relevant to the issue to be determined": *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139 at p.160 per Deane J; see also the discussion in *Bretag v Immigration Review Tribunal and Minister of Immigration, Local Government and Ethnic Affairs* [1991] FCA 582 (29 November 1991)

84. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations;
 - r.2.03A of the Regulations.

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).